**PRIMA NOVA SDN BHD**

**v.**

**AFFIN BANK BHD**

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI FCJ
MOHAMED APANDI ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-237-10]
28 MAY 2014

***BANKING:*** *Banker and customer - Duty of customer - Forgery - Stolen cheques - Honouring of - Failure of customer to inform bank about stolen cheques in a timely manner - Whether could amount to fraud - Whether bank correctly debited from customer's current account - Whether customer knowingly or negligently contributed to forgery - Whether cheques honoured in good faith - Whether bank protected - Whether discrepancy on signature detected by bank - Bills of Exchange Act 1949, s. 73A*

***BANKING:*** *Cheques - Forgery - Stolen cheques - Honouring of - Failure of customer to inform bank about stolen cheques in a timely manner - Whether could amount to fraud - Duty of customer - Whether bank wrongly debited from customer's current account - Whether customer knowingly or negligently contributed to forgery - Whether cheques honoured in good faith - Whether bank protected - Whether discrepancy on signature detected by bank - Bills of Exchange Act 1949, s. 73A*

***TORT:*** *Conversion - Banker and customer - Duty of customer - Forgery - Stolen cheques - Honouring of - Failure of customer to inform bank about stolen cheques in a timely manner - Whether could amount to fraud - Whether bank wrongly debited from customer's current account - Whether customer knowingly or negligently contributed to forgery - Whether cheques honoured in good faith - Whether bank protected - Whether discrepancy on signature detected by bank - Bills of Exchange Act 1949, s. 73A*

The appellant operated a current account with the respondent bank. On 12 November 2003, the appellant's office was broken into and burgled. Six days after the burglary, *vide* its letter dated 18 November 2003, the appellant instructed the respondent to stop payment on certain cheques. However, the respondent only received the letter on the following day. By this time, the

respondent had already made payment to the payee of all the cheques. Following the honouring of the stolen cheques, the appellant's account with the respondent was duly debited with the proceeds of the same. As such, the appellant commenced this claim based on the tort of conversion by claiming that the respondent had wrongly debited its current account with the proceeds of the stolen cheques in light of the fact that the signatures of the mandatory signatories to the said cheques had been forged. The respondent, however, argued that the appellant was in breach of s. 73A of the Bills of Exchange Act 1949 ('s. 73A') in that its conduct had facilitated the fraud or forgery of the stolen cheques and/or in breach of its duty, due to the appellant's failed to inform the respondent of the unauthorised cheques after it became aware of the same. Dismissing the appellant's claim, the High Court ruled that (i) the signatures on the stolen cheques had been forged; (ii) the appellant had knowingly or negligently contributed to the forgery; and (iii) the respondent honoured the stolen cheques in good faith. Hence, this appeal.

**Held (dismissing appeal with costs)**
**Per Anantham Kasinather JCA delivering the judgment of the court:**

**(1)** Under common law, the customer's duty in relation to forged cheques is twofold *ie*, he must exercise due care in drawing his cheques so as not to facilitate fraud or forgery and he must inform his bank, at once, of any unauthorised cheques of which he becomes aware. The rationale for the rule is because the law expects the customer to not mislead the bank as regards the terms of his mandate. The first duty was laid down in *London Joint Stock Bank Ltd v. Macmillan* ('the *Macmillan* duty') and the second duty was laid down in *Greenwood v. Martins Bank Ltd* ('the *Greenwood* duty'). (paras 4 & 15)

**(2)** The words "negligently contributed to the forgery or the making of the unauthorised signature" in s. 73A meant that so long as the forgery or the incorporation of the unauthorised signature of the mandatory signatories was caused by the negligence of the authorised signatories, the bank was thus protected, provided the payment of the cheque was effected in good faith. Failure to report the stolen cheques in a timely

manner and thereby causing the bank to honour the cheques could amount to fraud within s. 73A in cases where the forgery was an "inside job" but would, in any event, amount to a breach of the *Greenwood* duty. (paras 22 & 23)

**(3)** Following the burglary, neither the chairman nor the secretary undertook any serious investigation to ascertain the extent of the loss. There was no evidence to show that they had undertaken an inventory to ascertain the nature and extent of the losses suffered by the appellant. Further, the appellant's chairman, who had left the matter of informing the respondent entirely in the hands of En Mohd Khairi, had knowledge of the stolen cheques the day following the robbery. There was unchallenged documentary evidence that En Mohd Khairi only informed the respondent on 19 November 2003. In other words, the chairman was conscious of his duty to inform the respondent of the stolen cheques but made no effort to ensure that this was done. (para 24)

**(4)** Based on the contents of the police report, the evidence of the chairman that he required En Mohd Khairi to notify the respondent on 13 November 2003 and the fact that the signatures of the mandatory signatories had been scanned, the irresistible inference was that the burglary was perpetrated by insiders who had control of the cheque books and the specimen signatures. Even if the chairman did not have actual knowledge of the forgery, he was obliged to notify the respondent as long as he had reasonable grounds to believe that his signature had been forged. Further, the respondent's staff gave evidence that they did contact the chairman before some of the stolen cheques were honoured and a person who identified himself as the chairman had acknowledged that the signatures on the stolen cheques belonged to him. (paras 24 & 25)

**(5)** Applying the wider statutory duty of care introduced *via* s. 73A, the appellant was negligent and it was this negligence that facilitated the forgery, causing the respondent to honour the stolen cheques. The appellant was in breach of the *Greenwood* duty in failing to report the stolen cheques until the cheques had been honoured. Further, there was unchallenged evidence of the respondent's staff that they did compare the signatures on the stolen cheques with those on the specimen card and effected payment only upon being satisfied that the

A signatures resembled the specimen signatures. Since the signatures on the stolen cheques had been scanned from the specimen signatures, it was hardly surprising that the staff were unable to detect any discrepancy. (para 24)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu memegang akaun semasa dengan bank responden. Pada atau kira-kira 12 November 2003, pejabat perayu telah dipecah masuk. Enam hari selepas rompakan itu, melalui surat bertarikh 18 November 2003, perayu mengarahkan responden untuk C menghentikan bayaran bagi beberapa cek. Walau bagaimanapun, responden hanya menerima surat itu pada keesokan harinya. Dalam masa ini, responden telah pun membuat bayaran kepada penerima cek tersebut. Berikutan penunaian cek yang dicuri, akaun perayu dengan responden telah didebit dengan bayaran yang dibuat itu. D Oleh itu, perayu memulakan tindakan ini berdasarkan tort penukaran dan menuntut bahawa responden telah, dengan salah, mendebit akaun semasa perayu bagi bayaran cek yang dicuri itu berasaskan fakta bahawa tandatangan penandatangan mandatori cek-cek tersebut telah dipalsukan. Responden, walau E bagaimanapun, berhujah bahawa perayu telah memungkiri s. 73A Akta Bil Pertukaran 1949 ('s. 73A') di mana perbuatannya telah memudahkan penipuan atau pemalsuan cek-cek yang telah dicuri dan/atau dalam memungkiri tanggungjawabnya, kerana kegagalan perayu untuk memaklumkan responden berkenaan cek-cek yang F tidak diberi kuasa selepas menyedari tentang keadaan tersebut. Menolak tuntutan perayu, Mahkamah Tinggi memutuskan bahawa (i) tandatangan di atas cek-cek yang dicuri telah dipalsukan; (ii) perayu telah mengetahui atau menyumbang cuai kepada pemalsuan tersebut; dan (iii) responden telah menunaikan cek-cek yang dicuri G itu dengan suci hati. Oleh itu, rayuan ini.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:**

H

**(1)** Di bawah 'common law', tanggungjawab pelanggan berkaitan dengan cek-cek palsu adalah dua bahagian iaitu, dia mestilah berhati-hati dalam mengeluarkan cek sehingga tidak membantu frod atau penipuan dan dia mesti memaklumkan kepada bank I dengan segera mengenai apa-apa cek yang tidak diberi kuasa jika dia mempunyai pengetahuan tentangnya. Rasional bagi kaedah ini adalah kerana undang-undang mengharapkan pelanggan untuk tidak menipu bank berkaitan dengan terma-

terma mandatnya. Kewajipan pertama dinyatakan dalam *London Joint Stock Bank Ltd v. Macmillan* ('kewajipan *Macmillan*') dan kewajipan kedua dinyatakan dalam *Greenwood v. Martins Bank Ltd* ('kewajipan *Greenwood*'). A

**(2)** Perkataan "menyumbang secara cuai kepada pemalsuan atau peletakan tandatangan yang tidak sah" di bawah s. 73A bermaksud asalkan pemalsuan atau tandatangan mandatori tidak sah itu disebabkan oleh kecuaian penandatangan yang diberi kuasa, bank dilindungi, atas syarat cek dibayar dengan suci hati. Kegagalan membuat laporan mengenai kecurian cek-cek tersebut tepat pada masanya dan dengan itu menyebabkan bank menunaikan cek-cek tersebut boleh berjumlah kepada frod di bawah s. 73A dalam kes-kes di mana pemalsuan adalah "kerja dalaman" tetapi akan, dalam sebarang keadaan, berjumlah kepada kemungkiran kewajipan *Greenwood*. B C D

**(3)** Berikutan rompakan yang berlaku, pengerusi atau setiausaha tidak mengambil sebarang siasatan serius untuk mengenalpasti jumlah kerugian yang dialami. Tiada keterangan untuk menunjukkan bahawa mereka telah menyediakan inventori untuk mengenalpasti sifat dan tahap kerugian yang dialami oleh perayu. Tambahan, pengerusi perayu, yang meninggalkan tanggungjawab sepenuhnya kepada En Mohd Khairi untuk memaklumkan responden, mempunyai pengetahuan mengenai cek-cek yang dicuri pada keesokan harinya selepas rompakan. Terdapat keterangan dokumentar yang tidak dicabar bahawa En Mohd Khairy hanya memaklumkan responden pada 19 November 2003. Dalam erti kata lain, pengerusi sedar akan kewajipannya untuk memaklumkan responden mengenai cek-cek yang dicuri tetapi tidak mengambil sebarang usaha untuk memastikan perkara ini dilakukan. E F G

**(4)** Berdasarkan kandungan laporan polis, keterangan pengerusi bahawa beliau mengarahkan En Mohd Khairi untuk memaklumkan responden pada 13 November 2003 dan fakta bahawa tandatangan penandatangan mandatori telah diimbas, inferens yang tidak boleh dielakkan adalah bahawa rompakan telah dilakukan oleh orang dalaman yang mempunyai kawalan terhadap buku cek dan contoh tandatangan. Walaupun pengerusi tidak mempunyai pengetahuan mengenai pemalsuan itu, beliau mempunyai tanggungjawab untuk memaklumkan responden asalkan dia mempunyai alasan munasabah untuk mempercayai bahawa tandatangannya telah dipalsukan. H I

A Tambahan, staf responden telah memberi keterangan bahawa dia telah menghubungi pengerusi sebelum cek-cek yang dicuri itu ditunaikan dan seorang yang mengenali dirinya sebagai pengerusi telah mengakui bahawa tandatangan di atas cek-cek yang dicuri itu adalah kepunyaannya.

B

**(5)** Menggunakan kewajipan statutori berhati-hati yang luas di bawah s. 73A, perayu telah cuai dan kecuaian inilah yang telah memudahkan penipuan, menyebabkan responden untuk menunaikan cek-cek yang dicuri itu. Perayu melanggari
C kewajipan *Greenwood* atas kegagalan melaporkan cek-cek yang dicuri sehingga cek-cek tersebut ditunaikan. Tambahan, terdapat keterangan yang tidak dicabar daripada staf responden bahawa mereka telah membandingkan tandatangan atas cek-cek yang dicuri dengan kad contoh tandatangan dan membuat
D bayaran hanya selepas berpuas hati bahawa tandatangan itu menyerupai contoh tandatangan. Memandangkan tandatangan-tandatangan di atas cek-cek yang dicuri telah diimbas daripada contoh tandatangan, adalah tidak menghairankan bahawa staf tidak dapat mengesan sebarang percanggahan.

E **Case(s) referred to:**

*Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad [2011] 1 LNS 414 HC* ***(refd)***

*Kepitigalla Rubber Estates v. National Bank of India Ltd [1909] 2 KB 1010* ***(refd)***

F *London Joint Stock Bank Ltd v. Macmillan [1918] AC 777* ***(refd)***

*McKenzie v. British Linen Co [1881] 6 App Cas 82* ***(refd)***

*Melewar Apex Sdn Bhd v. Malayan Banking Bhd [2007] 8 CLJ 579 HC* ***(refd)***

*Tai Hing Cotton Mill Limited and Liew Chong Hing Bank Limited [1968] 1 AC 80 PC* ***(refd)***

G *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC* ***(refd)***

*Young v. Grote [1827] 4 Bing 253* ***(refd)***

**Legislation referred to:**

H Bills of Exchange Act 1949, s. 73A

*For the appellant - Wong Alan (Alex Lim with him); M/s Zain Megat & Murad*

*For the respondent - Arham Rahimi; M/s Azim, Tunku Farik & Wong*

I *[Editor's note: For the High Court judgment, please see Prima Nova Sdn Bhd v. Affin Bank Bhd [2010] 9 CLJ 75.]*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Anantham Kasinather JCA:**

**Background Facts**

**[1]** The appellant was a customer of the respondent and operated a current account bearing no. 0291040000006519 ('the account') with the respondent's branch at Lot P3.4, Jalan Persiaran, Seksyen 14, 40000 Shah Alam. On or about 12 November 2003, the appellant's office was broken into and burgled. Six days after of the burglary vide its letter dated 18 November 2003, the appellant instructed the respondent to stop payment on the cheques bearing nos. 431138, 431139, 431140, 431141 and 431142 (see p. 286 of the appellant record (vol. 3)). The respondent only received this letter on the following day. By this time, the respondent had already made payment to one Karim bin Mohd Nasir, the payee of all the cheques. The particulars of the cheques including the amount and the date of payment are as follows:

a) Cheque no. 431138 dated 11 November 2003 for the sum of RM9,800 paid on 13 November 2003;

b) Cheque No. 431141 dated 13 November 2003 for the sum of RM98,000 paid on 17 November 2003;

c) Cheque No. 431142 dated 17 November 2003 for the sum of RM280,000 paid on 17 November 2003; and

d) Cheque No. 431139 dated 18 November 2003 for the sum of RM200,000 paid on 18 November 2003.

(collectively referred to as 'the stolen cheques')

**[2]** Following the honouring of the stolen cheques, the appellant's account with the respondent was duly debited with the proceeds of the same. The appellant commenced this claim based on the tort of conversion. The appellant's claim is that to the extent the signatures of the mandatory signatories to the stolen cheques had been forged, the respondent had no right to debit its current account with the proceeds of the stolen cheques. The appellant sought a declaration that the respondent had wrongly debited its current account with the proceeds and a further order for the repayment of the proceeds amounting to RM587,800 to the appellant.

A **Appellant's Case**

**[3]** Relying on the pronouncements of Annuar J (as His Lordship then was) in the Supreme Court case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 at
B p. 38 to the following effect:

> Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The
C forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in Section 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker.

D Learned counsel for the appellant submitted that once forgery is established, then, the respondent is liable since "a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss". Since the respondent had paid out on stolen cheques that were forged, counsel contended that the respondent bank must make good the loss and
E had no right to debit the appellant's current account.

**[4]** According to learned counsel for the appellant, the learned trial judge instead of applying the aforesaid principles of law pronounced by the Supreme Court, ruled that since the case of
F *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd (supra)* was decided prior to the amendment to the Bills of Exchange Act 1949, in the form of the new s. 73A, the respondent was entitled to rely on the new defences contained in this section. This ruling was challenged on the grounds that the
G amended s. 73A introduced no such new defences beyond those available to the respondent bank under the common law. According to counsel, s. 73A was nothing more than a codification of the limited common law defences available on a claim for the tort of conversion when a banker had paid upon forged cheques.
H These defences were summarised by the same judge in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd (supra)* at p. 40 to be:

> A consideration of the relevant authorities shows that at common
I law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as

> the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd. v. Macmilllan* [1918] AC 777 ('the *MacMillan* duty'). The second was laid down by the decision in *Greenwood v. Martins Bank Ltd.* [1993] AC 51 ('the *Greenwood* duty').

**[5]** Before we proceed to consider the authorities dealing with s. 73A, it would be useful to set out the section in full. Section 73A reads as follows:

> Notwithstanding Section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

**[6]** The case of *Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* [2011] 1 LNS 414, was cited to us as authority for the proposition that the new s. 73A merely enacted the aforesaid two defences afforded by the common law. With reference to 'the *MacMillan* duty', Justice Lee Swee Seng JC said:

> When one examines the first element in the new Section 73A ie, that the person whose signature it purports to be negligently contributes to the forgery, one would have realized that this element introduced by the amendment had not changed the first common law duty expressed as 'to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery'.

With reference to the implications of s. 73A as a whole in the context of the common law rule, His Lordship said:

> However the common law duty is much wider as covering fraud as well. The common law duty being still operative, the only difference is now a statutory enunciation of the common law duty where forgery is concerned. It is my considered view that there would have been no difference in the decisions discussed above even if reference to Section 73A of the Act had been made as the plaintiffs in those cases had discharged their common law duties, be it the first or second duty and unless they had been negligent in facilitating the forgery, there is no place for the introduction and application of the new element introduced by Section 73A which is that of having paid out in good faith.

**[7]** Based on the premise that s. 73A merely represented a codification of the common law rule and applying the law to the facts of this case, learned counsel for the appellant submitted that the learned trial judge's decision that the '*Greenwood* duty' defence availed the respondent is contrary to the evidence in that it was impossible to detect that the stolen cheques were missing from the cheque book. The thrust of the case of the appellant was that because the stolen cheques were removed from the middle of the cheque book, the appellant was unable to discover the tampering of the cheque book until the necessity to issue a cheque arose on 18 November 2003. For this reason, counsel for the appellant submitted that the appellant was not negligent in notifying the bank only on 18 November 2003.

**[8]** Finally, as regards the scope of cl. 4.2 of the contract between the parties, learned counsel submitted that His Lordship erred in holding that cl. 4.2 imposed a higher duty of care when it came to notifying the bank about stolen cheques than that imposed under the common law. Learned counsel for the appellant submitted that the learned trial judge erred in failing to appreciate that the *ratio decidendi* of the Privy Council case of *Tai Hing Cotton Mill Limited and Liew Chong Hing Bank Limited* [1968] 1 AC 80 PC was that for a contractual clause to absolve a bank of liability for honouring a forged cheque, there must exist a 'clear and unambiguous' provision to that effect. Counsel submitted that cl. 4.2 on a literal construction of the same only applied to cases where the customer sought to countermand a mandate contained in a genuine cheque issued by the appellant.

**Respondent's Case**

**[9]** The respondent relied on two alternative defences:

a) First, that the appellant was in breach of s. 73A in that its conduct had facilitated the fraud or forgery of the stolen cheques and or that in breach of its duty it failed to inform the respondent of the unauthorised cheques after it became aware of the same; and

b) Secondly, that the respondent is absolved of any liability by virtue of cl. 4.2 of the rules and regulations governing the operation of the respondent's Current Account.

**[10]** The respondent quoted extensively from the *Hansard* and contended that the purpose of s. 73A is to limit the rigours of strict liability previously imposed on banks under the common law. In other words, the thrust of the submission of counsel for the respondent was that s. 73A imposed a statutory duty on customers to avoid acting in a manner which facilitates the forgery of their signatures. According to counsel, s. 73A introduced the following changes in the banking law of this country:

a) This section provides statutory protection to bankers where the customers had acted negligently by facilitating the forgery of their signatures; and

b) The customers have to bear the risk if they acted negligently and the bank pays upon such cheques in good faith.

## Judgment Of The High Court

**[11]** His Lordship held that for the respondent to succeed in its defence, it had to establish on a balance of probabilities the following facts:

a) The signatures on the stolen cheques have been forged ('the first condition');

b) The appellant had knowingly or negligently contributed to the forgery ('the second condition'); and

c) The defendant honoured the stolen cheques in good faith ('the third condition').

**[12]** Since it was not in dispute that the signatures had been forged, His Lordship held the first condition to be satisfied. As regards the second condition, His Lordship noted that the police report lodged as early as 10.05am on 13 November 2003 made reference to the table of a member of the staff namely Cik Zawati "telah diumpil" and the cheque book "diterbalikkan". Since the appellant acquired knowledge of the tampering of the cheque book as early as 13 November 2003 but waited till the stolen cheques had been honoured by the respondent before notifying the respondent, the learned trial judge held the appellant to have contributed to the forgery of the signatures on the stolen cheques and the second condition consequently satisfied.

**[13]** Since the staff of the respondent had undertaken a comparison of the signatures on the stolen cheques with the specimen signatures and found the signatures to be similar, His Lordship ruled that the respondent had satisfied the third condition. On this basis, His Lordship ruled that the respondent had satisfied the requirements of s. 73A and thereby availed themselves of the protection afforded by that section.

**[14]** His Lordship also examined cl. 4.2 of the rules and regulation governing the relationship between the parties and expressed the view that pursuant to cl. 4.2, the appellant was obliged to promptly issue stop payment instructions upon discovering the stolen cheques. Since the appellant delayed giving such instructions till 19 November 2003, His Lordship ruled that cl. 4.2 afforded the respondent a contractual defence to the appellant's claim. His Lordship consequently dismissed the appellant's claim.

## Judgment Of The Court

**[15]** We propose to examine the duty owed by the customer to the bank under the common law and the rationale for the same before proceeding to determine the scope of s. 73A. Under the Common law, the customer's duty in relation to forged cheques is, twofold:

> He must exercise due care in drawing his cheques so as not to facilitate fraud or forgery and he must inform his bank at once of any unauthorized cheques of which he becomes aware.
>
> (see *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd & Ors (supra)*)at page 108)

In other words, although the customer's duty was to be not negligent, the common law required the negligence to be in the transaction itself. Lord Finlay put it this way in the celebrated case of *London Joint Stock Bank Ltd. v. Macmillan* [1918] AC 777 HL:

> Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often

> been made to extend the principle of *Young v. Grote* (1) beyond the case of negligence in the immediate transaction, but they have always failed.
>
> (See p. 795)

**[16]** The rationale for the above common law rule is because the law expects the customer to not mislead the bank as regards the terms of his mandate. In the same case of *London Joint Stock Bank Ltd. v. Macmillan (supra)*, Lord Finlay approved the rationale for the common rule set out in the judgment of Bray J in *Kepitigalla Rubber Estates v. National Bank of India Ltd.* [1909] 2 KB 1010 to the following effect:

> I should come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given. The learned judge goes on to point out that to afford a defence to the banker the breach of duty must be, as in *Young v. Grote*. In connection with the drawing of the order or cheque, and that there is no obligation as between customer and banker that the person should take precautions in the general carrying on of his business or in examining and checking the pass-book.

**[17]** The facts of the case of *Young v. Grote* [1827] 4 Bing. 253 was cited by the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan (supra)* as affording a good example of an instance where the customer's negligence in drawing up the cheque facilitated the forgery thereby precluding the customer of his right of recovering the value of his cheque. The facts and judgment of the Court in *Young v. Grote (supra)* as set out in the judgment of Lord Finlay are as follows:

> The facts in *Young v. Grote* are few and are stated in the award of the arbitrator on which the decision of the Court of Common Pleas was given. Mr Young, when leaving home for some days, left with his wife five blank cheques signed by him and desired her in his absence to have them filled up for such sums as the purposes of his business might require. Mrs Young wanted 50£, 2s. 3d to pay wages, and delivered one of her husband's blank cheques to Worcester, a clerk of his, authorizing him to fill it up for 50£.2s.3d. What followed is best stated in the words of the award as set out in the report of the case: "Worcester accordingly filled it up with that sum, and shewed it so filled up to Mrs. Young, and she desired him to get it cashed, but the check, when it was so filled up and shewn to Mrs Young, presented the

following appearance: the first line contained in print the names of the bankers; the second line contained the words Pay wages or bearer, the word wages only being in writing, and the third line contained the words fifty pounds and the figures 2s. 3d; but the word fifty commenced in the idle of that third line, and with a small letter, so that ample space in that line was left for the insertion of other words before the word fifty; and there was at the bottom of the draft the figures 50.2.3, but the figure 5 was at a sufficient distance from the letter '£' to allow another figure to be inserted between it and the letter '£'. Worcester afterwards fraudulently inserted the words "Three hundred and" before the words "fifty", and the figure '3' before the figure '5'. The alterations were so made that they could not have been detected by any ordinary diligence, and the bank paid to Worcester 350£.2.3d. against the cheque and debited the customer with the amount. He objected, alleging that his draft was only for 50£.2s.3d. The award then proceeds as follows: "The arbitrator thought that it was his draft for that sum only, but he thought, also, that he had been guilty of gross negligence, by causing his draft to be delivered to Worcester (in whose hand-writing the body of it had been filled up) in such a state that the latter could and did, by the mere insertion of other words, make it appear to be the draft of Peter Young for the larger sum; and that as he, partly by his negligence, had caused the bankers to pay the larger sum, he was bound to make good to them the loss, which, by reason of his negligence, they had sustained by paying that sum. If the Court of Common Pleas should think that opinion wrong, then he awarded that Peter Young was entitled to receive from Grote & Co, the sum of three hundred pounds, and ordered accordingly.

It is obvious that the award left to the Court the questions whether the arbitrator was right in thinking that Young had been guilty of gross negligence, and whether he was bound to make good to the bankers the larger sum which they had paid owing partly to his negligence. Best CJ pointed out the negligence in the manner in which the wife had the cheque filled up, and said that it was by the neglect of ordinary precautions that the bankers were induced to pay. He remarked that in the case of *Hall v. Fuller*, which had been relied upon, the cheque was properly drawn in the first instance and the forgery consisted in expunging the words and figures and the insertion of others in their place. The Chief Justice concluded his judgment by saying: "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer". Park J said that the

concurred in the opinion of the arbitrator that Young was guilty of negligence; Burrough J said that the blame was all on one side; and Gaselee J that there certainly was gross negligence on the part of Young, and therefore the rule must be discharged.

(See pp. 790-791)

**[18]** Lord Finlay in the same judgment ruled the *ratio decidendi* of *Young v. Grote (supra)* to be:

The sole ground upon which *Young v. Grote* was decided by the majority of the Court of Common Pleas was that Young was a customer of the bank owing to the bank the duty of drawing his cheque with reasonable care, that he had delegated the performance of this duty to his wife, that she had been guilty of gross negligence in having the cheque filled up in such a manner as to facilitate an increase of the amount, and that the fraudulent alteration of the cheque by the clerk, to whom, after being filled up, it had been entrusted by her for the purpose of getting payment, would not have taken place but for the careless manner in which the cheque was drawn.

(see p. 793)

**[19]** In the Privy Council case of *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd & Ors (supra),* an attempt was made by counsel for the bank to extend the duty of care owed by the customer beyond the *'Macmillan'* and *'Greenwood'* duties. Lord Scarman delivering the leading judgment of Their Lordships summarised the bank's case for the wider duty in this manner:

The banks accept, of course, that both duties exist and have been recognized for many years to be part of English law. Their case is that English law recognizes today, even if it did not in 1918 or 1933, an altogether wider duty or care. This is, they submit, a duty upon the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it for payment. Further, and whether or not they establish the existence of this wider duty, they contend that the customer owes a duty to take such steps to check his periodic (in this case, monthly) bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorized. They submit that, given the relationship of banker and customer and the practice of rendering periodic bank statements, the two duties for which they contend are "necessary incidents" of the relationship. The source of obligation, they say,

A is to be found both in the contract law as an implied term of the banking contract and in the tort law as a civil obligations arising from the relationship of banker and customer.

They accept that the reasoning to be found in *Macmillan*'s case [1918] AC 777 appears at first sight to negative the existence of B both the duties for which they contend: but they offer the explanation that the law of contract and the tort law were significantly different in 1918 from the state of the relevant modern law. In particular, they point to developments in the law relating to the circumstances in which the courts will now imply C a term into a contract, and to the changes in tort law both as to the range of relationships giving rise to liability in tort and as to the circumstances in which loss or damage will be held to result from breach of a duty of care. Their implied term point they base on the decision of the House of Lords in *Liverpool City Council v. Irwin* [1977] AC 239; and their two tort points on decisions of D the Board in *Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd (The Wagon Mound)* [1961] AC 388 and of the House of Lords in *Anns v. Merton London Borough Council* [1978] AC 728.

E (See pp. 101-102)

**[20]** Lord Scarman in rejecting the submission of counsel for the banks to impose the higher duty of care on the customers said:

The argument for the banks is, when analysed, no more than that F the obligations of care placed upon banks in the management of a customer's account which the courts have recognized have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed upon the customer: and they cite *Selangor United Rubber Estates Ltd. v. Cradock* [1968] 1 WLR 1555 (Ungoed–Thomas J) G and *Karak Rubber Co Ltd v. Burden* [1972] 1 WLR 602 (Brightman J). *One can fully understand the comment of Cons J.A that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted* H *by statute further protection.* (emphasis added)

But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer I a service, which is to honour their customer's cheques when

drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer.

The limits set to the risk in the *Macmillan* [1918] AC 777 and *Greenwood* [1933] AC 51 cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account. Counsel for the banks asked rhetorically why, once a duty of care was recognized, should it stop at the *Macmillan* and *Greenwood* limits. They submitted that there was no rational stopping place short of the wider duty for which they contended. With very great respect to the ingenious argument addressed to the Board Their Lordships find in certain observations of Bray J. In *Kepitigalla*'s case [1909] 2 KB 1010 a convincing statement of the formidable difficulties in the way of this submission. Bray J said at pp. 1025-1026:

> I think Mr Scrutton's contention equally fails when it is considered apart from authority. It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to this case, can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate

A them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.

Their Lordships reject, therefore, the implied term submission. (See pp. 105-107)

B

**[21]** The question posed to us in this appeal is really whether s. 73A is that piece of legislation which Lord Scarman suggested the banks should encourage the legislature to introduce to overcome their difficulty in incorporating clauses in their contracts C extending the duty of care required of their customers. The learned trial judge opined this to be the case but provided little by way of legal reasoning to support His Lordship's ruling to this effect. We propose in this judgment to endeavour to provide the reason as to why in our judgment the legislature did indeed intend D by this s. 73A to impose the wider duty of care on customers.

**[22]** At the outset we wish to highlight that under the *'Macmillan'* rule, the customer is only required to exercise care with the way he draws a cheque. In our judgment, the words E "negligently contributes to the forgery or the making of the unauthorized signature" in s. 73A whether construed literally or by way of purposive construction, can only have one meaning. That is this. So long as the forgery or the incorporation of the unauthorised signature of the mandatory signatories was caused by F the negligence of the authorised signatories, then, the bank is protected provided the payment of the cheque was effected "in good faith". By reason of the absence of any qualifying words in s. 73A, whichever construction is adopted, in our respectful view, there is no basis to limit the protection enjoyed by the bank under G s. 73A to negligence in the drawing of the cheque only. In our opinion if it was the intention of the legislature to limit the protection afforded by this section to the '*Macmilla*n duty', nothing would have been easier than to qualify the word "negligence" with the words "in the drawing of the cheque". In this respect, our H opinion to this effect is reinforced by the statements made by the Deputy Finance Minister when introducing this amendment in Parliament.

**[23]** Accordingly, in our judgment, the effect of s. 73A is to afford protection to a bank paying "in good faith" in all cases in I which there was negligence on the part of the drawer and which negligence afforded the opportunity for the forgery or fraud in circumstances that were the immediate cause of the payment by

the banker. Failure to report the stolen cheques in a timely manner and thereby causing the bank to honour the cheques could amount to fraud within s. 73A in cases where the forgery was an 'inside job' but would in any event amount to a breach of the '*Greenwood* duty'. In other words, the effect of the amendment is that our courts should no longer determine the liability of a bank on a claim on forged cheques based on whether the customer observed the *'Macmillan'* and *'Greenwood'* duties approved by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd (supra)* but the wider duty of care considered but rejected by the Privy Council in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd & Ors (supra)*.

**[24]** Applying the wider statutory duty of care introduced by s. 73A, in our opinion, on the balance of probabilities the appellant was negligent and it is this negligence that facilitated the forgery, ultimately causing the respondent to honour the stolen cheques. It is also our finding that the facts of this case support the conclusion that the appellant was in breach of the '*Greenwood* duty' in failing to report the 'stolen cheques' until the cheques had been honoured. Our reasons for these findings are as follows:

i) The authorised signatories of the cheque book of the appellant did not keep it their possession. Instead, the book was in the possession of one Cik Zawati, a clerk in the employ of the appellant. The cheque book was kept in Cik Zawati's table although the appellant maintained a safe in the premises. Similarly the file containing the specimen signatures of the mandatory signatories was also not kept by them. The Chairman of the appellant (PW1) claimed that the file containing the specimen signatures was kept by the secretary (ie, the other mandatory signatory) in the safe in her room. However, the secretary when giving evidence proffered no explanation as to how the signatures could have been scanned without her knowledge if the file was in her possession. Our finding is that, obviously the staff had easy access to the cheque book and the file containing the specimen signatures thereby facilitating the 'making' of their signatures on the stolen cheques. We are conscious that there are a plethora of authorities to the effect that delegating the task of looking after the cheque book to a staff member and not placing the cheque book in the safe does not *per se* constitute negligence. With respect, in our judgment, this line of authorities can no longer be followed following the introduction of s. 73A. We

A also observe that His Lordship Abdul Wahab Patail J (as His Lordship then was) in the case of *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579; [2007] 3 MLJ 687 whilst rejecting the submission that s. 73A introduced the wider duty of care nevertheless acknowledged that a duty of B care may be imputed to the employer to employ a trusted employee and oversee the employee if the employee is authorised to sign cheques on behalf of the employer. The facts of this case reveal that the secretary of the company namely one Ms Leela Devi Supaya was authorised to sign C cheques on behalf of the appellant as the mandatory joint signatory together with the chairman of the company. However, the cheque book was not in the possession of either Ms Leela or the Chairman of the appellant. This is evident from the answer of the Chairman to the following question D during cross-examination.

Q: Knowing there form, Dato do you agree with me that you do not have in 2003 any personal knowledge as to how the cheque of the plaintiff company and other financial documents were kept by the staff of the Account E Department, am I right?

A: Yes

ii) Furthermore, although the fact that the cheque book was in F the drawer of one of the staff by the name of Cik Zawati formed the subject matter of the police report lodged by the appellant when reporting the burglary, the chairman and mandatory signatory of the cheques of the appellant professed to being totally ignorant of this fact as evidenced by the G following answers of PW 1 during cross-examination:

Q: Dato this request you specifically mention this phrase is actually 9 line from the bottom it sate as follow Dato:

Meja Cik Zawati telah diumpil dan buku cheque H diterbalikkan'. You agree with me that this shows that the cheque of the plaintiff were kept into Cik Zawati desk?

A: I do not know.

I Q: You do not know?

A: No.

iii) The Chairman readily conceded during cross-examination that Encik Mohd Khairi and Cik Zawati enjoyed control over the items in the drawers of their table including the cheque book as evidenced by the following answers:

> Q: You also said Zawati and Khairi in charge of the account matters. I put it to you Dato, my question do only Khairi and Cik Zawati can tell the Court how the cheque were kept by them before the burglary took place?
>
> A: Yes
>
> Q: I put it also to you Dato you do not know relation to this burglary, what are the documents were kept in Zawati's desk?
>
> A: Yes

iv) The chairman of the company conceded that prior the theft of the cheque book, Encik Mohd Khairi and Cik Zawati not only had access to the cheque book of the company but also to the specimen signature of the authorised signatories of the cheque as evidenced of the following answer:

> Q: Not agree, it ok. At the time of the theft Dato, do you know who have access. Sorry, I rephrase. YA. At the time of the theft Dato' by nature of the fact that Cik Zawati and Mohd. Khairi were the account clerk of the plaintiff then I put it to you Dato they have access to the sample of the signature of the authorize signatory to the account, am I right?
>
> A: Yes.

v) Following the burglary, neither the Chairman nor the secretary of the appellant undertook any serious investigation to ascertain the extent of the loss. We make this finding because there is no evidence of either the chairman or the secretary of the appellant having undertaken an inventory to ascertain the nature and extent of the losses suffered by the appellant. On the contrary the secretary conceded that she left the task of preparing the inventory of missing items entirely in the hands of her staff. This is evident from the following question and answer during cross-examination of the secretary of the appellant:

A Q: To the best of your knowledge Miss Leela after the burglary was discovered by the Plaintiff was there any item prepared by the Plaintiff list of missing item, to the best of your knowledge?

A: To the best of my knowledge I think Khairi and Zawati on who's room and table where the burglary happened did prepared some list to be forwarded to the police.

Q: Miss Leela you used the word think. I put it to you, you are not sure that the day Khairi and Zawati did prepare the list, do you agree?

A: I was told by them they were ask to prepare but I did not see the final list.

Q: You agree with me that until today you did not see the list?

A: I have not seen them.

vi) The contents of the police report lodged by the accounting staff of the appellant on 13 November 2003 included the following: "meja Cik Zawati telah diumpil dan buku cek diterbalikkan.". The chairman of the appellant obviously had knowledge of the stolen cheques the day following the robbery as evidenced by the following answers:

Q: Did you personally know that four cheques was stolen or somebody told you that four cheques was stolen?

A: Somebody told me that four cheques was stolen.

Q: Dato I put it to you that the defendant was only inform by the plaintiff about this burglary only on 19 November 2003?

A: No.

Q: Dato can I invite you to refer you to encl. 18 Ikatan Dokumen Bahagian

A page 5?

A: Yes.

Q: Just now Dato you disagree with me that the defendant was only inform by the plaintiff on 19th November 2003. Dato can you refer to the top part of the letter right

hand corner, do you agree with me that it shows that Affin Bank Berhad Shah Alam receive your letter on 19th November 2003 at 12.09 PM?

A: Yes.

Q: So I put it to you Dato that the defendant only knew about this theft only on 19th November 2003, am I right?

A: No.

Q: I put it to you Dato that on 19th November 2003 Khairi also verbally inform the defendant about the burglary, do you agree?

A: I was told that bank the defendant was informed much earlier by my staff.

Q: Who told you that Dato?

A: Khairi

Q: Khairi told you?

A: Yes.

Q: I put it to you Dato that this is not true.

Do you agree or not?

A: Silent.

Yet as is apparent from the answers of the chairman, he left the matter of informing the respondent entirely in the hands of Encik Mohd Khairi and there is unchallenged documentary evidence that Encik Mohd Khairi only informed the respondent on 19 November 2003. In other words, the chairman of the appellant was conscious of his duty to inform the respondent of the stolen cheques but made no effort to ensure that this was done.

The fact of the matter is that Encik Mohd Khairi did not attend court and according to the unchallenged evidence of the staff of the respondent, Encik Mohd Khairi only informed them on 19 November 2003 after the stolen cheques had been honoured.

vii) There is the evidence of the staff of the respondent that Encik Mohd Khairi had gone to the bank on 19 November 2003 for the first time and claimed that he had not informed the bank earlier because he did not realise that the cheques had been stolen. Additionally, he informed the bank staff that:

> Beliau juga telah memaklumkan kepada kami bahawa tandatangan-tandatangan di atas cek-cek tersebut telah diimbas ('scanned') oleh pelaku frod menyebabkan ianya kelihatan benar-benar serupa dengan tandatangan sebnear Dato' Karim dan Lela Devi.

In the face of the contents of police report and the evidence of the chairman that he required Encik Mohd Khairi to notify the respondent on 13 November 2003 and the fact that the signatures of the mandatory signatories had been scanned, the irresistible inference is that the burglary was perpetrated by insiders who had control of the cheque book and the specimen signatures. Our finding to this effect is fortified by the fact that the stolen cheques were issued in the name of an identified payee and Encik Mohd Khairi in disregard of the chairman's instruction did not inform the respondent until the stolen cheques had been cashed individually by the same payee over a period of five days.

viii) Then, there is evidence of staff of the respondent that they did contact the chairman before some of the stolen cheques were honoured and a person identifying himself as the chairman ie, Dato' Mohd Karim had acknowledged that the signatures on the stolen cheques belonged to him. For instance, Encik Maziah bin Ali said at p. 221 of Rekod Rayuan Jilid 2 Bahagian B as follows:

> Saya telah buat panggilan kepada seorang lelaki yang mengakui bahawa beliau adalah Dato' Mohd Karim, salah seorang signatori untuk akaun Plaintif yang mengesahkan bahawa cek ini boleh dibayar oleh Defendan. Panggilan dibuat ke nombor telefon bimbit beliau yang tercatat di dalam surat Plaintif bertarikh 17.11.2003 di mukasurat 1 Ikatan Dokumen Bahagian C.

We acknowledge that this conversation took place should preferably have been put to the chairman in cross-examination but in our view the fact that it was not put is not a reason to disregard this evidence. There is no reason for the staff to

tell a lie since it is reasonable to expect the staff to contact the customer if the account is overdrawn as was the case here (see Q&A no. 9 at 219 of Rekod Rayuan Jilid 2).

ix) Finally, on the question of the *bona fides* of the respondent, there is the unchallenged evidence of the staff of the respondent that they did compare the signatures on the stolen cheques with those on the specimen card and effected payment only upon being satisfied that the signatures resembled the specimen signatures. In the light of the acknowledgement by Encik Mohd Khairi that the signatures on the stolen cheques had been scanned from the specimen signatures, it is hardly surprising that the staff were unable to detect any discrepancy.

## Conclusion

**[25]** In our judgment, the evidence recited in paras 24 herein affords ample evidence of negligence on the part of the appellant under the wider duty of care introduced by s. 73A. In our judgment, the contents of this paragraph also supports the conclusion that the appellant was in breach of the '*Greenwood* duty' in failing to report the stolen cheques until all of the cheques had been honoured by the respondent. In this respect, even if the chairman had no actual knowledge of the forgery, he was obliged, in our opinion, to notify the respondent so long as he had 'reasonable grounds to believe' that his signature had been forged. Naturally, a customer must reasonably believe his signature to have been forged if his cheque book has been tampered with since a cheque can only be used to draw funds with the signature of the authorised signatories (see *McKenzie v. British Linen Co* [1881] 6 App Cas 82 at p. 92). We have not dealt with that part of the learned trial judge's judgment that cl. 4.2 also served to protect the respondent because, with respect, we agree with the submission of counsel for the appellant that cl. 4.2 does not avail the respondent on the particular facts of this case. In our view, cl. 4.2 is only applicable to cases where the customer seeks to countermand an earlier mandate contained in a cheque carrying the authorised signature of the customer.

A **[26]** Accordingly, this appeal was dismissed with costs. The appellant was ordered to pay costs of RM10,000 to the respondent. Deposit to respondent towards account of fixed costs.

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